

TAB 54

C-20316

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REFER TO FILE NO.
30822-021

VIA FACSIMILE & U.S. MAIL

Executive Director
California Transportation Commission
P.O. Box 942873
Mail Station 52
Sacramento, CA 94273-0001

**Re: Objection to Proposed Adoption of Resolution of Necessity for
Acquisition of Property Located at 13500 Firestone Blvd., Santa Fe
Springs, CA (Carl's Jr. #300)**

Dear Executive Director:

This firm represents Carl Karcher Enterprises, Inc. ("CKE"), lessee of the above-referenced property. We have received notice of a California Transportation Commission's ("CTC") intent to adopt a resolution of necessity authorizing The People of the State of California, acting by and through the Department of Transportation ("State") to take the subject property by condemnation for freeway purposes. Based upon the amended notice received on March 30, 2010, the CTC's hearing on that resolution of necessity is scheduled for April 7-8, 2010, in Costa Mesa, California. No address or time was specified in the notice.

The purpose of this letter is to provide CKE's written objections to the adoption of the resolution of necessity. Accordingly, we request that this letter be included as part of the formal record on that agenda item. Additionally, we intend and hereby request to appear and be heard on our objections at the hearing.

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1. **The State Failed To Extend A Legitimate Precondemnation Offer Pursuant To Government Code Section 7267.2.**

Government Code section 7267.2 requires that the State make a legitimate offer of just compensation based upon an approved appraisal prior to initiating condemnation proceedings. A written statement and summary basis for the offer must include sufficient details to indicate clearly the basis of the offer. (Gov. Code, § 7267.2, subd. (b).)

Although the State did make CKE an offer of compensation for its improvements pertaining to the realty and other personal property sought to be condemned, the State conditioned CKE's acceptance of that offer upon the waiver of substantial rights concerning any future claims for compensation relating to property interests *excluded* from the State's offer. Specifically, as the owner of a business operating on the property sought to be condemned, CKE is entitled to just compensation for any loss of business goodwill caused by the business' displacement due the State's condemnation. CKE is entitled to a jury trial to determine the amount of just compensation to be paid for such a loss. (Cal. Const., Art. I, § 19.)

The State neither appraised CKE's business goodwill at the subject property nor made an offer of compensation for any loss of or damage to its goodwill caused by CKE's displacement. Moreover, the State's proposed right of way contract specifically excluded compensation for loss of goodwill from the amount of compensation payable being offered and paid under the contract. Despite that exclusion, however, the State's proposed right of way contract expressly conditioned CKE's acceptance of the just compensation being offered for improvements pertaining to the realty and certain other personal property upon additional terms:

- requiring CKE to submit any claim for loss of business goodwill through a claim process that the California Legislature already has determined is not required (Gov. Code, § 905.1);
- creating a rigid time period for CKE to seek compensation for its loss of goodwill that (a) cuts short by at least a year the ordinary statutory time period that CKE would have to seek just compensation and (b) requires CKE to sit back and wait for up to 14 months while the State determines ~~whether or not it will take any action with regard to the claim; and~~
- requiring CKE to waive its right to jury trial on the goodwill compensation issue by having the matter determined by a court in a declaratory action for declaratory relief.

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The State's effort to strong-arm CKE into submitting to such a procedure and waiving its constitutional right to a jury trial on the goodwill compensation issue, in exchange for accepting an offer of compensation for other property interests that the State *was required by law to make*, renders the State's offer ineffectual and unlawful. If CKE cannot accept the State's offer for compensation for certain property interest without having to waive substantial rights related to its ability to seek compensation for other property interests specifically excluded from the State's offer, that offer does not comply with Government Code section 7267.2 and cannot support the adoption of a resolution of necessity.

2. The State Failed To Negotiate In Good Faith Pursuant To Government Code Section 7267.1.

Government Code section 7267.1 imposes an affirmative obligation on a public agency seeking to condemn property to seek to acquire that property first by negotiation (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973.) "The public agency shall make every reasonable effort to acquire expeditiously real property by negotiation." (Gov. Code, § 7267.1(a).) The duty to negotiate is designed to avoid litigation: "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, make every reasonable effort to acquire property by negotiation." (8 Witkin, Summary of Cal. Law (9th ed. 2004) Const. Law, § 972.)

In its "negotiations" to acquire certain defined property, the State conditioned CKE's acceptance of its offer of compensation upon the waiver of substantial rights relating to any future compensation claim by CKE for property interests expressly excluded from the State's offer. For the reasons set forth above, such a conditional offer of compensation violates both the letter and spirit of Government Code section 7267.2, which requires the State to make a legitimate offer of compensation for any property interests sought to be acquired. As a result of that condition, CKE could not accept the State's offer of compensation for the defined property without waiving substantial rights relating to its right to compensation claim for the excluded property. And the State's representatives failed to respond to CKE's telephone calls and correspondence requesting removal of the offending condition from the proposed right of way contract.

The State's conduct does not constitute good faith negotiation. The State has not used the precondemnation offer process in an effort to avoid litigation but, rather, to seek to force CKE to waive substantial rights for property interests not even covered by the

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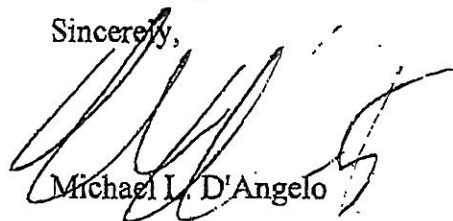
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offer. Because the State has no means of obtaining such waivers in any future eminent domain proceeding, its conduct was designed to obtain an unfair advantage through misuse of the precondemnation offer process. Far from seeking to avoid litigation, the State ensured that, in order to avail itself of all rights afforded under the California Constitution, CKE would be required to take its claims to litigation.

CKE requests that the proposed resolution of necessity be denied until such time as the State has met with CKE and either: (a) tendered a precondemnation offer of compensation that includes compensation for loss of business goodwill; or (b) tendered an offer of compensation for CKE's improvements pertaining to realty and other personal property *without* any conditions as to CKE's waiver of rights pertaining to any future goodwill claim.

If you have any questions regarding the foregoing, please do not hesitate to give me a call at 949 851 7323.

Sincerely,



Michael L. D'Angelo

MLD:cv

cc: Andrew P. Nierenberg
Larry T. Young
Patrick A. Hennessey